No. 80.

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OFFICE SUPREME COURT
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Supreme Court of the United States.

Petition for Rehearing.

NO. 80 OCTOBER TERM, 1901

THE MIDWAY COMPANY,
Plaintiff in Error,

AGAINST

FRANK W. EATON, LEONIDAS MERRITT, MERRILL M. CLARK, RICHARD H. FAGAN and MARGARETHA LONSDORF.

Rec'd Feb. 7, 1902.

SUPREME COURT OF THE UNITED STATES.

No. 81 OCTOBER TERM, 1901.

THE MIDWAY COMPANY,
Plaintiff in Error,

AGAINST

FRANK W. EATON, LEONIDAS MERRITT, MERRILL M. CLARK, RICHARD H. FAGAN and MARGARETHA LONSDORF.

The plaintiff in error in these actions respectfully petitions for a re-hearing, and upon a single point, and considerations incidental to it.

Preliminary.

The cases present the question of the credit which belongs to the action of the Department of the Interior of the Government of the United States.

effect that the scheme of a blank power of attorney is a palpable device to evade the Act of 1854, and particularly in view of the fact, to use Justice BROWN's language, "that the grantors were Indians" (Opinion of Mr. Justice BROWN, p. 326).

Vide, also, opinion of Mr. Justice BROWN in *Fee vs. Brown 162 U. S., 602.*

The duty to give the Indians or half-breeds the protection which is due to them from the Government rests with its Department of the Interior. It was properly exercised in this case, and the plaintiff in error could safely rely upon it for its protection.

If it be claimed that the execution by Eaton in his own favor of the so-called powers of attorney needed to be disaffirmed, it devolved upon the Department of the Interior to discharge this duty in the interest and for the protection of the half-breed. It did so. If the protection was due to the Government the Department acting for the Government has refused to affirm it.

The petition of the plaintiff in error is for a rehearing upon the foregoing point. An examination of the opinion of Mr. Justice MCKENNA will show that it was not dealt with by him.

The plaintiff in error had the right to rely, if the Act of July 17th, 1854, was ambiguous, upon the settled construction given to it from the time of its passage to the present date by the Land Department of the United States, as to which construction the Supreme Court of Minnesota, in *Gilbert vs. Thompson*, declared: "That it was the intention of Congress that the right to acquire "public lands by means of this script should be a personal right "in the one to whom the same issued," and in *Merick vs. Thompson* declared that the act required that the location should be made for the benefit of the half-breed principal, and not for that of the attorney with which construction the Supreme Court of the United States in *Felix vs. Patrick* (145 U. S.) agreed. These decisions, as well as the construction placed upon the act by the Land Department, taken in connection with the decisions of this Court as to the effect to be given to the long-continued construction of a statute and the right of the public to rely thereon, constituted assurances to the plaintiff in error and the public generally of the perfect safety with which he could rely upon the action of the Land Department in cancelling the locations in question, and could purchase and expend money upon the premises involved in the controversy.

Mr. Justice McKENNA, in his opinion, says that this is a "close case." It is respectfully and urgently submitted that it is a case which pre-eminently calls for a further hearing.

January 31st, 1901.

THE MIDWAY COMPANY,
By A. M. MILLER,
President.

{ Corporate Seal }

We hereby certify that we have carefully examined the decision of the Court in these cases, that we are familiar with the cases, and that, in our opinion, there should be a rehearing, and that this motion is not made for purposes of delay.

Dated January 31st, 1902.

JNO. E. PARSONS,
JOHN G. JOHNSON,
Of Counsel for Petitioner.

No. 80 and 81.

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SUPREME COURT
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Mem. on Pet'n for Rehearing.

Supreme Court of the United States.

81

NO. 80, OCTOBER TERM, 1901.

~~Received Feb. 7,~~ 1902.

THE MIDWAY COMPANY,
Plaintiff in Error,

AGAINST

FRANK W. EATON, LEONIDAS MERRITT, MERRILL M. CLARK, RICHARD H. FAGAN and MARGARETHA LONSDORF.

Memorandum in Support of Motion for Rehearing.

The decision in effect holds: 1, that an agent may act for his own benefit concerning the subject matter of the agency; and, 2, that such action is binding upon his principal.

The Court by its decision has sustained the transfer of the scrip for the lands in controversy by Eaton, under power of attorney, although the transfer was to himself.

In so far as the decision of the Court sustains the right of a half-breed to be divested of his scrip by power of attorney it proceeds upon the assumption that the attorney acts as attorney, and that the transfer by attorney is to a stranger.

Here the power of attorney was executed by Eaton in his own interest.

It is universally recognized that this may not be done.

Robertson vs. Chapman, 152 U. S., 673.
Wardwell vs. R. R. Co., 103 U. S., 651.
Williams vs. Company, 43 Minn., 537.
Smitz vs. Leopold, 51 Minn., 455.
Dutton vs. Willner, 52 N. Y., 312.
Murray vs. Beard, 102 N. Y., 505.

However effectual, in cases where there is an actual transfer to a third person, may be the device of a double power of attoeney, it is directly against both the spirit and language of the protection afforded by the Act of 1854, when the transfer by the attorney is to the attorney, even if this were part of the arrangement with the half-breed.

Upon the subject of the use of a double power of attorney executed in blank, both as to the name of the attorney and the description of the land accompanying the scrip, this Court has said in Felix vs. Patrick, 145 U. S., 317, that it was a palpable device to evade the provisions of the law against the transfer of the scrip.

In Fee vs. Brown, 162 U. S., 602, this Court says, with reference to the use of a double power of attorney, as in the case at bar (p. 607):

> "Notwithstanding this provision, which was intended to secure to the holder of the certificate the land itself, they were made the subject of purchase and sale through the device of powers of attorney, signed by the person to whom the scrip was issued, authorizing some person, whose name was left in blank, to locate the scrip upon lands to be selected by him, and to sell and convey the lands so selected. On the patent being issued to the person named in the certificate, the name of the attorney was filled in, and the deed executed by such person as the attorney in fact of the person named in the certificate to the actual purchaser. *Of course, this scheme was in the nature of a fraud* upon the act."

If it be granted that this device may succeed where the power of attorney is executed in the ordinary way—that is to say, so as to accomplish a transfer from the principal through attorney to a stranger, it is respectively submitted that the case is essentially different where the attorney and the transferee are the same. That was this case.

There could be no more effectual scheme by which to defeat the Act of 1854, whether it be assumed that it was intended for the protection of the half-breed or for the protection of the Government.

Such devices in whatsoever form, for the purpose of evading a statute, have been characterized by this Court as fraudulent, the test being not the form of the transaction, but whether there is an intent to evade the law, and that intent is accompanied by the means for its accomplishment. Thus in the case of the Trinidad

Coal and Coking Co., 137 U. S., page 170, this Court says, at page 167:

> "It was for Congress to prescribe the conditions under which individuals and associations of individuals might acquire these lands, and its intention should not be defeated by a narrow construction of the statute." * * * (Page 166:) "It is contended that the case made by the bill is not within the prohibitions of the statute, although the demurrer admits that the Trinidad Coal & Coking Co. acquired the lands in dispute pursuant to a scheme whereby the several tracts were to be entered for their benefit in the name of certain persons—its officers, stockholders and employees—the title when thus obtained to be conveyed to the company, which should and did bear all expenses attending the entries and purchase from the Government. This contention cannot be sustained unless thecourt lends its aid to make successful a mere device to evade this statute.
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> There is consequently, in view of all the allegations of the bill, no escape from the conclusion that the lands in question were fraudulently obtained from the United States. We say fraudulently obtained because if the facts admitted by the demurrer had been set out in the papers filed in the land office the patents sought to be canceled could not have been issued without violating the statute. The defendant would not have been permitted to do indirectly that which it could not do directly.
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> It is the case of an association seeking to evade an Act of Congress by using for its own benefit the names of both its members and employees to obtain from the Government vacant coal lands which it could not legally obtain upon entries made in its own name."

The effect of the opinion in the case at bar is to overthrow the principle of this decision by treating as immaterial evidence to show the real intent and effect of the transaction taken as a whole.

2. In this connection attention is called to a misapprehension as to the facts in the cases of Myrick vs. Thompson, and Gilbert vs. Thompson, appearing upon the face of the opinion, which must have misled the Court. In the opinion at page 10 (bottom) the Court says:

> "If evidence was excluded in Gilbert vs. Thompson, it was admitted and considered in Thompson vs. Myrick, and

in both cases the delivery of the scrip and its location under letters of attorney were decided to be valid, forming in one case a good title, and in the other constituting a ground *for a compulsory conveyance from a half-breed.*"

And at page 12 (bottom) it is said :

> " It was decided in Thompson vs. Myrick, *supra*, that a valid location could be made by an attorney in fact of the Indian, and that he could, 'either before or after the location was made,' *enter into an agreement to* secure or convey the title. That case was affirmed by this Court, and the facts of the case at bar bring it within the ruling."

But in Myrick vs. Thompson *there was but a single* power of attorney, that to *locate* the scrip, accompanied by *no* power to convey or agreement from the half-breed. No decree for specific performance was made against the half-breed, nor was any contract either made by her or upon her behalf. Upon the evidence admitted the Court asserted the true meaning of the statute, and said that there was nothing to show its evasion. If there was an intent to transfer the scrip the intent was effectual because not accompanied by the means for its accomplishment.

In Gilbert vs. Thompson there was but a single power—that to convey the land—which was executed, not in favor of the attorney as in case at bar, but in favor of an innocent third person, and at the time of the suit patent had issued, the land had passed through the hands of three or four innocent parties who were in possession, and the title of the half-breed *had been perfected* by the issue of patent, and neither she nor the Government were parties to the action, but the Court said that " *It was the intention of Congress that the right to acquire public land by means of the scrip should be a personal right in the one to whom a scrip issued.*"

3. The protection afforded by the Act of 1854 is due either to the half-breed or to the Government. If it is to the Government, then it is manifest that the Government never acquiesced in the evasion of the law that was attempted by Eaton and his associates, but, on the contrary, through the action of the Department of the Interior, disaffirmed and annulled it.

If the protection intended by the Act of 1854 was for the benefit of the half-breed, then again the action of Eaton and his associates was in direct violation of its terms. The attempted device was a

mere sham. The action of Eaton under the power of attorney could only be sustained upon the assumption that what really occurred was a transfer of the scrip and that the power of attorney was a device to make it effectual, and this is what in direct terms is forbidden by the act.

4. The true meaning of the Act of 1854, if ambiguous, is settled by the construction given to it by the department charged with its execution for so long a period, by the decisions of the Supreme Court of Minnesota asserting its true meaning, and by that of this Court in Felix vs. Patrick; so that within the principle of Hewitt vs. Schultz, 180 U. S., 139; U. S. vs. Alabama Railroad, 142 U. S., 621; Hawley vs. Diller, 178 U. S., 476, and many other decisions of this Court, the plaintiff could safely rely upon this construction, and upon the duty of the Land Department to execute the law in accordance therewith, as the guardian of the people of the United States in all matters relating to the disposal of public lands and the enforcement of the law (Knight vs. Association, 142 U. S., 161; Orchard vs. Alexander, 157 U. S., 372; Hawley vs. Diller, 178 U. S., 476).

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